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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 405

J. S. GARLINGTON, ET VIR,

Petitioners,

against

A. L. WASSON.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS.

M. C. MARTIN,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 405

J. S. GARLINGTON, ET VIR,

Petitioners,

against

A. L. WASSON.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS, AUSTIN, TEXAS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Summary Statement of Matter Involved.

This case presents the question of the validity and construction of Sub-Section (O) and Sub-Section (S) of Title 11, Section 203 of the Bankruptcy Act, and more particularly known as the Frazier-Lemke Act.

Such act sets out a procedure to be followed by farmers desiring to avail themselves of "agricultural compositions and extensions."

The petitioner in this case filed his application for an extension, and having failed to obtain a majority consent of creditors, filed his application under Sub-Section (S) of said act. While such proceedings were still pending, creditor A. L. Wasson foreclosed on certain real estate

belonging to petitioner, on which there existed a mortgage lien held by creditor in the principal amount of Five Thousand ($5,000.00) Dollars. Such proceedings were had originally by sale under deed of trust, and subsequently ratified by the District Court of Howard County, Texas.

An appeal was taken to the Court of Civil Appeals for the Eleventh Supreme Judicial District, at Eastland, Texas, which court affirmed. A motion for re-hearing was denied. Petitioners duly and timely filed their application for a writ of error to the Supreme Court of Texas, and on May 20, 1942, the Supreme Court of Texas denied a motion for a re-hearing.

This is a petition for writ of certiorari to review the decree of the Supreme Court of Texas refusing petitioners' application for a writ of error.

Reasons Relied Upon for the Allowance of the Writ.

This case presents the question of construction relating to an act of Congress, which has been passed upon by this Court and upon which the Supreme Court of Texas has, by its action in denying a writ of error, held adversely.

The cause was brought and has proceeded to final judgment in the court below with due regard to procedural and jurisdictional requirements. All essential questions of jurisdiction and procedure were fully explored in the State Tribunals in that the question of jurisdiction under the laws of Texas can be raised at any time, and as a result, the decision sought to be reviewed is based squarely upon the construction of the Federal statute involved.

The sole question involved is whether or not the State court has authority or jurisdiction to maintain foreclosure proceedings upon property belonging to a debtor after he has filed proceedings under Sub-Section (S) of Title 11, Section 203.

It is submitted that the decisions of this Court below cited hold to the contrary, which decisions are as follows:

John Hancock Mutual Life Insurance Company v. *Bartelle,* 308 U. S. 180, 84 L. Ed. 176;

Kalb v. *Feuerstein,* 308 U. S. 433, 84 L. Ed. 370.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Texas, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein, and that the decree of the Supreme Court of Texas be reversed and rendered by this Honorable Court, and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem proper and just.

M. C. MARTIN,
CARLTON, MARTIN & STREET,
501 *Wilson Building,*
Dallas, Texas,
Counsel for Petitioners.

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No. 401

SUPREME COURT OF THE UNITED STATES

J. S. GARLINGTON ET UX, *Petitioners*

vs.

A. L. WASSON, *Respondent*

MOTION OF A. L. WASSON ASKING THAT PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS BE DISMISSED

CLYDE E. THOMAS,
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Big Spring, Texas,
THOMAS & THOMAS, Attorneys
Of Counsel for Respondent,
Big Spring, Howard County,
Texas.

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No. 405

SUPREME COURT OF THE UNITED STATES

J. S. GARLINGTON ET UX, *Petitioners*

vs.

A. L. WASSON, *Respondent*

MOTION ASKING THE DISMISSAL OF THE APPLICATION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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the powers of the Supreme Court of the United States to do what they claim should have been done in the State Courts as well as the Federal Court having original jurisdiction of the identical issue involved 8

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The District Court of the United States had jurisdiction to dispose of the mortgaged land in the manner in which it performed such duties 8

Such irregularity as allowing the holder of the mortgage to pursue the sale of the property under his Deed of Trust, or in the State Court, in satisfaction of the mortgage, instead of having a sale by a Trustee appointed by the District Court, is not such an irregularity as to make void the disposition of the land under Sec. 203, Subdv. 3, in Title 11, Federal Code 9

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The District Court has the authority to dispose at any time land that would be a burden on the balance of the Estate, when such issue is brought to the Court's attention by pleadings, a formal hearing and judgment 10

That, if the District Court makes a sale of part of the Estate in order to dispose of land in which there is no equity and in which the Bankrupt has no investment, before the three year period next after the filing under the Frazier-Lempke Act, the remedy of the injured party is to appeal from such judgment to United States Circuit Court of Appeals rather than attempting to invoke the powers of the Supreme Court of the United in the first instance 10

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There was no final judgment from the Supreme Court of Texas involving the construction of the Act of Congress, and the Supreme Court of the United States does not therefore have jurisdiction to issue a writ of certiorari 10

PRAYER 16

1.

Brief Statement of the Nature of the Cause

A.

Prior to December the 31st, 1939, J. S. Garlington and wife, Jennie L. Garlington, caused to be filed under the provisions of the Frazier-Lempke Act, in the Bankruptcy Court at Abilene, Northern District of Texas, their petition under Sec. 75 in due form to obtain the privileges under such Act of Congress. (Tr. p. 67.)

After the filing of such Petition under the terms and provisions of the Frazier-Lempke Act, A. L. Wasson, the holder of a mortgage on four tracts of land (only a part of the real estate of the Petitioners given in their Petition as the estate to be administered), presented his Motion to have such mortgaged land released or sold in satisfaction of his mortgage, and Petitioners, J. S. Garlington and Jennie L. Garlington, and A. L. Wasson joined issue, and the United States District Court, after hearing the pleadings and the evidence thereon, entered the final judgment on December the 4th, 1939. (Tr. 58-60.)

In this judgment by Hon. T. Whitfield Davidson, Judge of the United States District Court for the Northern District of Texas, the court held, among other matters, the following facts:

That A. L. Wasson held a first lien against the land in question for the sum of $14,788.24; and a second lien for the sum of $5,385.25.

That the Farm Debtor purchased this land Sept. 1, 1927, and contracted to pay the sum of $14,920.00,

and that the purchase money was represented entirely in the form of notes for the security of which the mortgages were given.

That the Farm Debtor had the unmolested use of the land in question from September 1st, 1937, to December 4th, 1939.

That he had paid no part of the principal.

That he had paid no part of the interest on the first lien.

That he was in default in the payment of the interest on the second lien indebtedness.

That he was in default in the payment of the State and County taxes on the land in the amount of $343.22.

That since September 1st, 1937, Farm-Debtor has done nothing to enhance the value of the land, and has permitted the improvements thereon to deteriorate in value.

That there is no equity in said land above the indebtedness.

That it would be burdensome to the estate for this Court to administer said land.

That it would be to the best interests of the estate (the remaining portion not discharged), and beneficial thereto, to abandon this land to the holder of the said indebtedness for the purpose of pursuing a foreclosure outside of the jurisdiction of this Court.

Then followed the order of the trial Court to the effect that such portion of the estate be released unto the said holder of the mortgages, A. L. Wasson, that he be "permitted to foreclose his liens in the State Court

or otherwise in accordance with his notes and deeds of trusts and contracts with Farm-Debtor outside the jurisdiction of this Court."

(Tr. pp. 58 to 60; and copied in full in this Answer as Exhibit A for the convenience of the Court.)

B.

Thereafter, the Petitioners prosecuted no appeal to the Circuit Court of Appeals for the Fifth Circuit, and therefore they acquiesced in the above and foregoing final judgment of the District Court for the Northern District of Texas.

C.

Thereafter, A. L. Wasson, under the terms of the Deed of Trust and Contract with the said J. S. Garlington and wife, Jennie L. Garlington, proceeded to foreclose, such Notice being the first step in such procedure, being posted December the 6th, 1939. (Tr. p. 57.)

D.

That thereafter the land was duly sold at public auction (Tr. p. 54), with the son and partner present at the sale (Tr. pp. 33 and 34).

E.

That A. L. Wasson filed an original suit in the State District Court January 3rd, 1940, for the purpose of judicially establishing the validity of the sale of the land under the terms of the Deed of Trust and clearing any cloud from the title, naming J. S. Garlington

and Jennie L. Garlington defendants, and sequestered the land on said date and obtained possession thereof (Tr. pp. 1 to 8).

F.

The defendants resisted going to trial to such an extent as to cause plaintiff A. L. Wasson to proceed on two different occasions by way of mandamus. (145 S. W. (2d) 915, and 149 S. W. (2d) 1041.)

G.

That on May 24th, 1941, the State District Court rendered judgment in favor of A. L. Wasson, and against defendants therein, J. S. Garlington and Jennie L. Garlington, for this land, confirming the sale thereof had under the terms of the Deed of Trust, and adjudging the title and possession rightfully in the plaintiff thereof (Tr. pp. 22 and 23).

H.

That no money judgment against the said defendants (save and except for costs) was taken (Tr. p. 23).

I.

The defendants therein attempted to take the matter to the Court of Civil Appeals, at Eastland, Texas, for a review, but altogether failed to present their brief, and the said appellate court, for want of prosecution, dismissed such appeal. On pages 87 and 88 of the Transcript, such judgment of the Court of Civil Appeals is shown in full, and it will be noted that the opinion does not discuss the construction of the Frazier-Lempke

Act of Congress, and the cause was decided wholly on a non-Federal question. Such opinion and judgment of the appellate court is copied in this brief in full for the convenience of the Court, and is found herein as Exhibit B, in the Appendix of this Answer and Brief.

J.

That after the dismissal of the appeal, as aforesaid, the Petitioners, J. S. Garlington and wife, Jennie L. Garlington, presented their application to the Supreme Court of Texas for a Writ of Error, which was refused (Tr. pp. 94 and 95). That on the Motion for a Rehearing, the Supreme Court overruled the same (Tr. p. 104). Copy of the Decree of the Supreme Court refusing the Application for a Writ of Error is copied for convenience in the Appendix of this Answer as Exhibit C; and the Order Overruling the Motion for a Rehearing is copied therein as Exhibit D.

2.

Point One:

The Petitioners failed to prosecute their cause, after the final decision of the United States District Court, Abilene, in the Northern District of Texas, by way of an appeal to the Fifth Circuit, and thus cannot be heard to complain now of irregularities in the procedure had in the administration of that portion of the estate now under question.

The Honorable T. Whitfield Davidson, District Judge, held, in the judgment of December the 4th, 1939, that the land should be sold. The Court had in mind,

no doubt, the Subdivision 3 of Section 203 (s) in Title 11, of the Frazier-Lempke Act:

> "At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: Provided, *That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submited, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interest may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: Provided, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction.* The debtor shall have ninety days to reedeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest, into court, and he may apply for his discharge, as provided for by this Act. If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the prop-

erty sold or otherwise disposed of as provided for in this Act."

After a hearing on pleadings, the evidence, as found by the trial Court, showed that it would be beneficial to the estate to have the property sold for the liquidation of the secured indebtedness.

It is true that the above and foregoing provision contemplates a sale of such property by the appointment of a Trustee by the Court, but the irregularity of allowing a sale in some other manner that meets the ends of justice and the purpose of the provision is not such an irregularity as to make the sale void, for the reason the Petitioners herein did not at the time object to the action of the trial Court on such irregularity, and did not appeal the cause to the Circuit Court of Appeals for the purpose of correcting the mode and manner of sale of the land secured by the indebtedness.

Then again, Petitioners allowed the State Court to proceed to the adjudication of the regularity of the foreclosure under the Deed of Trust, and waived the remedy of an injunction from the Federal Court. In other words, the Petitioners waived any right they had whatsoever in having the land sold by and through a Trustee appointed by the Federal District Court, and acquiesced in and impliedly agreed to the procedure of a sale by the Trustee under the terms of the Deed of Trust, and to the jurisdiction of the State District Court, by waiving an appeal from the decision of the Federal Court of December 4th, 1939, and the failure to attempt to restrain the action of the State Court in further administering on this portion of the Debtor's estate.

Then, thereafter, Petitioners failed to prosecute their cause, setting up their defense upon which they claim jurisdiction of this Supreme Court now, to the Court of Civil Appeals, and therefore to the Supreme Court of Texas.

They are guilty of laches, in both the Federal Court and the State Courts, and now asks of this Court remedies that they might have had a chance to have the appellate Federal and State Courts to pass on and determine, but through their own laches allowed their rights to fall by the wayside, for it will be noted that the Court of Civil Appeals never took jurisdiction on the merits of the cause because of the negligence of the Appellants (Petitioners here), and dismissed the appeal and the Supreme Court of Texas affirmed (in a negative manner by refusing to allow the application for a writ of error) the dismissal of the appeal by the Court of Civil Appeals.

Point Two:

Respondent, A. L. Wasson, admits that there was an irregularity in the procedure of the Federal District Court in releasing the land secured by this mortgage from the Debtor's estate for the purposes of foreclosing the lien. But Respondent submits that such irregularity is one only of procedure, and it cannot be attacked collaterally as is attempted indirectly herein. In fact, the procedure is not complained of in the light of its being an irregularity; Petitioners are making the point that the Federal District Court does not have any authority to dispose of any portion of the Debtor's estate under any circumstances till after the expiration

of three years, and that such a disposal (irregular or in accordance with the above quoted provision) before the allotted time, is absolutely void and a nullity in every respect. This is the Peitioners' theory of their cause, it seems, and the grounds and reasons impliedly assigned by them for not appealing from the judgment of the Federal Trial Court of December the 4th, 1939.

Respondent herein takes the position that the trial Court, under the findings set out in the Judgment of December the 4th, 1939, could, before the expiration of three years, dispose of a portion of the estate, and further that the only remedy Petitioners had at that time was an appeal to the Circuit Court of Appeals for the Fifth Circuit. But the Petitioners took their chance in the trial of the issue as revealed in the Judgment of December the 4th in the Federal Court, failing to appeal, and then again took their chance in the procedure leading to an adverse judgment in the State District Court of May the 24th, 1941, and failing again to prosecute their appeal to the Appellate Courts of the State, and they are now in no position to ask for relief under the application to the Supreme Court of the United States for a Writ of Certiorari.

Point Three:

It is submitted that the Federal Trial Court has the power under Title 11, Section 203 (s), Subdv. 3, above quoted to make a sale of part of the real estate found to be under the circumstances set out in the findings of the trial Court, and that a trial, joined by all parties concerned, resulting in an adverse decision, not appealed from, is binding on all parties to the issue so formed and tried.

It is submitted, in this statement of the position of the Respondent, that the trial Court has the authority to dispose of that portion of the estate of a Farm Debtor that is a financial burden on the operation of the remaining portion of the estate.

And that a failure to appeal from such a judgment is to acquiesce in it as a final judgment.

Point Four:

There was no final judgment of the Supreme Court of Texas involving the consideration or construction of the Frazier-Lempke Act, and therefore the Supreme Court of the United States does not have the authority to grant the application for a writ of certiorari.

There was no final judgment of the Court of Civil Appeals of the State of Texas involving the consideration or construction of the Frazier-Lempke Act, and therefore the refusal of the Supreme Court of Texas to grant a writ of error to the Court of Civil Appeals did not impliedly or otherwise involve a consideration or construction of the act of Congress under the Frazier-Lempke Act.

The holding of both State Appellate Courts was to the effect that the cause had never been appealed and had not been brought up in such a form as to call for a consideration of the assignments of error in the appeal, and *the appeal was dismissed.*

It is the unvarying holding of the Supreme Court of the United States that an Application for a Writ of Certiorari is grantable only when the State Court of the last resort has rendered an opinion based upon a construction of a Federal Law.

In other words, the Supreme Court of the United States, under the Statute relating to writs of certiorari, has no authority to grant this application herein for the reason it is not shown that the Appellate Courts of the State of Texas in anywise based their actions on the construction of the Frazier-Lempke Act.

The leading case on the point, though the Statute has in some respects been amended since such date, is *Crowell v. Randell*, 10 Pet. U. S. 368, 9 L. Ed. 458.

In the case of *Adams v. Russell*, 229 U. S. 353, 57 L. Ed. 1224, it is made plain that to authorize the granting of an application for a writ of certiorari, the decision and opinion of the Appellate State Court must show that the adverse decision turned on a Federal question:

> "The petition was denied without opinion, and it is left indefinite upon what grounds—whether the Court entertained the views adverse to plaintiff in error's on the Federal Question, or whether it considered its former decision determined his rights; whether, *as a matter of procedure*, a re-

hearing was his remedy, or whether the new claim of 'good time' allowance was untenable under the statute."

In the case of *Eustis v. Bolles*, 150 U. S. 361, 37 L. Ed. 1111, the Court was dealing with a final judgment of the higher State Court, wherein there was a Federal and also a State question, and the Court held that if the State issue was sufficient to sustain the holding of the State Court, then regardless of the presence of the Federal question, the Supreme Court of the United States did not have any jurisdiction to review the case.

In the case at bar, the final decision was made May the 24th, 1941, in the District Court of Howard County, and evidently the time has expired in which to apply for a writ of certiorari to the State District Court, even if such were permissible. In effect there was no appeal from such judgment of the State District Court, due wholly to the laches of the Petitioners herein, and the Appellate Courts of the State of Texas acted on the matter of procedure only in dismissing the appeal.

In the case of *Mississippi & M. R. Co. v. Rock*, 4 Wall. 177, 18 L. Ed. 381, there was a possibility of two grounds of decision, Federal and State, and this Court declined to review the judgment.

Keeping in mind that the case at bar turned purely on the procedure prevailing in the State Courts of Texas, and under such procedure the Appellant must file a brief in order to secure the attention and consideration of the Appellate Courts, and that the Appellants, J. S. Garlington and wife, Jennie Garlington, failed to do so, it logically and legally followed the

Texas Appellate Courts dismissed their appeal; and also keeping in mind that the dispostion of the cause was made on its merits in the trial Court and was final there, the Appellants' cause was disposed of by the Appellate Courts wholly on a non-Federal issue. Speaking of the rule discussed under this Point Four, Justice McKenna, in the *Adams v. Russell* case, stated:

> "The rule is a salutary one in view of the different jurisdictions of the state courts and of this court. It leaves in both the full plentitude of their powers. It permits no evasion by the state court of the responsibility of determining the Federal question if necessary to be determined; it permits no assumption by this court of jurisdiction to review the decision of local questions. The sufficiency of the local question to sustain the judgment rendered, and the necessity for the determination of the Federal question necessarily we have to consider, but, as was said in Johnson v. Risk: 'Where a defense is distinctly made, resting on local statutes, we should not, in order to reach a Federal question, resort to critical conjecture as to the action of the court in the disposition of such defense.' "

A writ of certiorari does not lie unless the Petitioners have caused the State Supreme Court to pass on the Federal question sought to be decided under the writ of certiorari.

In the instance at bar, the Petitioners failed to cause the Court of Civil Appeals of Texas to pass upon the Federal issue, and therefore the Supreme Court of Texas could not make any decision thereon, not having the authority under the law. No one is at fault, save

and except the Petitioners, who failed because of their own negligence to present the case in the proper form and in the allotted time to the Court of Civil Appeals. It is the same as if the Petitioners had duly appealed and failed to present an assignment involving a Federal question, and then thereafter sought a writ of certiorari.

This doctrine is stated in the case of *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U. S. 351, 56 L. Ed. 601:

> "If a general statement that the ruling of the state court was against the 14th Amendment were a sufficient specification of the claim of a right under the Constitution to give this court jurisdiction (see Clarke v. McDade, 165 U. S. 168, 172, 41 L. ed. 673, 674, 17 Sup. Ct. Rep. 284; Capital City Dairy Co. v. Ohio, 183 U. S. 238, 248, 46 L. ed. 171, 176, 22 Sup. Ct. Rep. 120; Marvin v. Trout, 199 U. S. 212, 217, 224, 50 L. ed. 157, 159, 161, 26 Sup. Ct. Rep. 31) still the basis for a review by this court is wholly lacking here. The 14th Amendment was mentioned only in the trial court. In the Supreme Court of the state no mention of it in the assignment of errors; nor was it, as far as appears by the record, otherwise presented to or passed upon by the court. * * *
>
> "We have no occasion, therefore, to consider whether the claim of denial of rights under the 14th Amendment was substantial in character which is required to support a writ of error. Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 311, 47 L. ed. 190, 192, 23 Sup. Ct. Rep. 123, Compare Hendersonville Light & P. Co. v. Blue Ridge Interurban R. Co., 243 U. S. 563, 61 L. ed. 900, 37 Sup. Ct. Rep. 440."

In other words, the Federal question apparently was raised in the trial Court but was not passed on in the State Appellate Court:

> "In the Supreme Court of the State no mention was made of it in the assignments of errors; nor was it, so far as appears by the record, otherwise presented to *or passed* on by that Court."

It seems reasonable that the Petitioners who failed to prepare their appeal in such due time to have the Federal issue, if there were to be one, passed on by the Appellate Courts of the State of Texas, are in the same identical position as was the Hiawassee River Power Company in failing to make proper assignments involving a Federal question and having and procuring the Appellate Court to pass on such issue.

We submit that in order for Petitioners to invoke the authority of the Supreme Court of the United States, they must have procured a final judgment of the Supreme Court of Texas wherein such Court passed on and decided a Federal question, or affirmed and made a final decision of the Court of Civil Appeals of the State of Texas wherein a Federal issue was the basis of such judgment.

Petitioners have failed to do so. It was their own oversight, negligence, and laches, and now they are not in a position to ask the exercise of the authority of the Supreme Court on an issue that has not been decided in this case by the Appellate Courts of the State of Texas, and has never been before such Court or Courts.

It may be contended by the Petitioners now before this Court, that the mere allegations in their application to the Supreme Court of Texas a Federal question is invoked, or that in their Motion for a Rehearing on their application to that Court they outlined a Federal question, and therefore these acts of Petitioners would give to this Honorable Supreme Court jurisdiction to grant the application for a writ of certiorari.

But such a view is untenable. The Texas Appellate Courts *must pass on a Federal question.* In this instance the Appellate Courts of Texas were unable to pass on any Federal question, or any issue involving the merits and non-merits of the appeal, for the reason, in effect, there was no appeal.

Any way such viewpoint of the Petitioners is untenable and has been decided against them in: *Bowe v. Scott,* 233 U. S. 658, 58 L. Ed. 1141, and also in *St. Louis & S. F. R. Co. v. Atchison, T. and S. F. R. Co.,* 240 U. S. 240, 60 L. Ed. 622.

Prayer:

Obviously the Application for a Writ of Certiorari should be denied; and comes now Respondent, A. L. Wasson, and prays the Court to dismiss Petitioners' Application, and assess the costs accordingly.

Clyde E Thomas

(Clyde E. Thomas)

Attorney for Respondent, A. L. Wasson,
First National Bank Bldg.,
Big Spring, Texas.

EXHIBIT A

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS

Number 1864

In the Matter of J. S. Garlington, et ux., Farm Debtor

In Proceedings for Composition and Extension
under Section No. 75

At Lubbock, Texas, in said district, on the 27th day of November, 1939, and December 4, 1939, came on to be heard the petition of A. L. Wasson of Big Spring, Texas, a secured creditor of Farm Debtor, that this case be dismissed and that Farm Debtor be denied further relief under the Bankruptcy Act, and also the alternative motion of said A. L. Wasson that the security for his debts, consisting of real estate, be discharged from the administration of this Court, and that the same be abandoned to him, and that he be permitted to pursue his remedies in the State Court and foreclose his liens against said land as provided for in said notes and deeds of trust;

And the Court, after having heard the pleadings, evidence and argument of counsel, is of the opinion and finds:

FIRST

That the said A. L. Wasson is the present legal and (fol. 84) equitable owner and holder of a valid, subsisting and unpaid first lien indebtedness amounting

to the sum of Fourteen Thousand Seven Hundred Eighty-Eight and 24/100 ($14788.24) Dollars, principal and interest, as of this date on the lands hereinafter described.

SECOND

That the said A. L. Wasson is the present legal and equitable owner and holder of a valid, subsisting and unpaid second lien indebtedness amounting to the sum of Five Thousand Three -- Eighty-five and 25/100 ($5385.25) Dollars, principal and interest, on said land as of this date.

THIRD

That said land is described as follows: Being Sections Numbers Twenty (20), Twenty-one (21), Twenty-two (22), and Twenty-three, (23), in Block Number Twenty-five (25), of the H. & T. C. Railway Company Survey in Howard County, Texas.

FOURTH

That said Farm Debtor purchased said land on September 1st, 1927, and contracted to pay therefor the sum of Seventeen Thousand Nine Hundred Twenty and No/100 ($17,820.00) Dollars, the purchase money being represented entirely by the principal of the notes forming the indebtedness mentioned in paragraphs First and Second hereof.

FIFTH

That said Farm Debtor has had the unmolested use and enjoyment of said land since said September 1st,

1937, and has paid no part of the principal of the purchase price of said land; that he has paid no part of the interest on the first lien indebetdness; that he is in default in the payment of interest on the second lien indebtedness; that he is in default in the payment of State and County taxes on said land to the amount of Three Hundred Forty Three and 22/100 ($343.22) Dollars.

SIXTH

That since September 1st, 1937, Farm Debtor has done nothing to enhance the value of said land but has permitted the improvements thereon to deteriorate in value.

SEVENTH

That there is no equity in said land above said indebtedness.

EIGHTH

That it would be burdensome to the estate for this Court to administer said land.

NINTH

That it would be beneficial to and for the best interest of this estate that said land be discharged from this proceeding and withdrawn from administration herein and that the same be abandoned to the holder of said indebtedness and that such holder be permitted to pursue his remedies outside the jurisdiction of this Court.

It is therefore Ordered, Adjudged and Decreed by

the Court that the motion of A. L. Wasson that the land described as Sections Numbers Twenty (20), Twenty-one (21), Twenty-two (22), and Twenty-Three (23), in Block Number Twenty-Five (25), of the H. & T. C. Railway Company Survey in Howard County, Texas, as security for his debts, be discharged from the administration of this Court, and that the same be abandoned to him, and that he be permitted to foreclose his liens in the State Court or otherwise as provided for in his notes and deeds of trust, be and it is hereby in all things Sustained and Confirmed and said land is hereby in all things Sustained and Confirmed and said land is hereby discharged from the administration of this Court, and abandoned to said Creditor, A. L. Wasson, and he is hereby permitted to foreclose his liens in the State Court or otherwise in accordance with his notes and deeds of trust and contracts with Farm Debtor outside the jurisdiction of this Court.

(fol. 86) It is further ordered, adjudged and decreed by the Court that in the event farm debtor tenders to A. L. Wasson the full amount of the principal and interest due together with the additional interest to accrue, at the time of such tender, plus the sum of Eleven Hundred and No/100 ($1100.00) Dollars Attorney's fees on the liens hereinabove described, on or before January 2nd, 1940, payment therefor, this court retaining jurisdiction of the subject matter herein only to the extent necessary to give effect to this judgment and not otherwise.

It is further Ordered that if an additional hearing is had herein the attorney for petitioning creditor shall

be allowed an additional fee of One Hundred Fifty and No/100 ($150.00) Dollars.

This the 4th day of December, 1939.

T. Whitfield Davidson, Judge U. S. District Court for the Northern District of Texas.

Approved as to form. O. M. Street, Attorney for J. S. Garlington, et ux. Howard D. McElroy, Attorney for A. L. Wasson.

I hereby certify that the foregoing is a true copy of the original thereof now on file. Attest: December 28, 1940.

George W. Parker, Clerk, by Ida M. James, Deputy. (Filed December 6, 1940)

EXHIBIT B

IN COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT, EASTLAND, TEXAS

From the District Court of Howard County

No. 2250

J. S. Garlington, et ux,

vs.

S. L. Wasson

From the District Court of Howard County
Judgment—February 13, 1942

Opinion by Grissom, A. J.

This cause came on to be heard on the transcript of the record, and the same being inspected, the court finds that no briefs were filed by appellant and that said cause should be dismissed, and it is so ordered. It is further ordered that all costs incurred by reason of this appeal be and the same are hereby taxed against the appellants, J. S. Garlington and Jennie L. Garlington, principals, I. H. Sumner and Gordon Buchanan, sureties on their appeal bond, for which let execution issue, and that this decision be certified below for observance.

(fol. 122)

IN COURT OF CIVIL APPEALS OF TEXAS

No. 2250

J. S. Garlington, et ux, Appellants,

vs.

A. L. Wasson, Appellee

Appeal from the District Court of Howard County

Opinion—Filed February 13, 1942

This cause was submitted on the transcript and statement of facts January 9, 1942. No Briefs have been filed. Appellants filed a motion for permission to file briefs January 7, 1942. No briefs were submitted with the motion and no briefs have yet been presented. The motion was filing briefs. It was heretofore overruled because it failed to show good cause for not filing briefs within the time provided by law.

Under the circumstances it is the custom of this court to dismiss the appeal in accordance with the opinion of the Supreme Court in Haynes vs. J. M. Radford Groc. Co., 14 SW (2d) 811. Se Ammon vs. DeMayo, 148 SW (2d) 945; Lancaster vs. Lancaster, 153 SW (2d) 269; LeSure vs. Sanders, 153 SW (2d) 722.

The appeal is dismissed.

(S) Clyde Grissom, Associate Justice.

February 13, 1942.

EXHIBIT C

IN SUPREME COURT OF TEXAS

April 22, 1942

App. No. 26294

vs.

J. S. Garlington et ux.

A. L. Wasson

From Howard County, Eleventh District

Certified Copy of Judgment of the Supreme Court of Texas on Application for Writ of Error

Filed May 25, 1942

This day came on to be heard the application of petitioners for a writ of error to the Court of Civil Appeals for the Eleventh District and the same having been duly considered, it is ordered that the application be refused; that the applicants, J. S. Garlington and Jennie L. Garlington, and sureties, I. H. Sumner and Gordon Buchanan, pay all costs incurred on this application.

EXHIBIT D

IN SUPREME COURT OF TEXAS

App. No. 26294

J. S. Garlington et ux.

vs.

A. L. Wasson

From Howard County 11th Dist.

Order Refusing Application for Writ of Error

April 22, 1942

This day came on to be heard the application of Petitioners for a writ of error to the Court of Civil Appeals for the Eleventh District, and the same having been duly considered, it is ordered that the application be refused; that applicants, J. S. Garlington and Jennie L. Garlington, and sureties, I. H. Sumner and Gordon Buchanan, pay all costs incurred on this application.

EXHIBIT E

IN SUPREME COURT OF TEAS

(Title omitted)

Order Overruling Motion for Rehearing
May 20, 1942

The motion for rehearing filed herein, having heretofore been submitted to the Court, and after due consideration of same, it is ordered that the said motion be, and is hereby overruled.

Office - Supreme Court, U. S.
FILED
FEB 15 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 405

J. S. GARLINGTON, et ux.,
Petitioners,
vs.
A. L. WASSON

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI

and

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI WITH BRIEF IN SUPPORT THEREOF.

WILLIAM LEMKE, Fargo, North Dakota,
ELMER MCCLAIN, Lima, Ohio,
Counsel for the Petitioners.

ROSS CARLTON, Dallas, Texas,
Of Counsel.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Ill.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 405

J. S. GARLINGTON, et ux.,
Petitioners,
vs.
A. L. WASSON

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

NOTE: All emphasis in this Petition for Rehearing and in the accompanying Supplement to Petition for Certiorari and Brief in Support Thereof is supplied.

PETITION FOR REHEARING.

To the Honorable Justices of the Supreme Court of the United States:

This petition for rehearing is filed by leave granted January 21, 1943.

Outline of the History of This Cause.

This matter originated by the filing of a farmer debtor petition, with schedules, in the United States District Court for the Northern District of Texas, Abilene Division, on July 26, 1939. R. 67 to 78.

On January 7, 1941, the respondent A. L. Wasson filed in the state District Court of Howard County, Texas, his petition for an order of possession and writ of ejectment against the said farmer debtors for an order declaring certain foreclosure proceedings against 2560 acres of farm real estate under a Deed of Trust from the farmer debtors to the respondent to be regular and valid. R. 6. This farm real estate had been scheduled in the farmer debtor proceeding. R. 70 and R. 74.

The petition of the respondent was granted by the judgment of the State Court. R. 22 and 23.

An appeal to the state Court of Civil Appeals was dismissed. R. 88. Motion for rehearing was overruled. R. 95.

Application to the Supreme Court of Texas for a writ of error was refused. R. 100. Motion for rehearing was overruled. R. 104.

Time to file a petition for certiorari in this court was extended to and including September 19, 1942. R. 104.

Petition for a writ of certiorari to the Supreme Court of Texas was filed September 19, 1942. R. 104. It was denied January 4, 1943. Time to file a petition for re-

hearing was extended to February 22, 1943. This petition for rehearing is filed within the extended period.

Why This Petition for Rehearing Is Necessary.

Throughout the federal and state court proceedings, in this particular cause, and others growing out of the farmer debtor proceeding, the only counsel for the petitioners was Olin M. Street, Esq., of Dallas, Texas, a member of the firm of Carlton, Martin and Street. No other member of the firm had any personal knowledge of the litigation. Even before the completion of the litigation in the state courts the imminence of the induction of Mr. Street into the military service distracted his attention from it. Before the record and petition for certiorari were prepared and filed Mr. Street entered the United States Army. The only member of the firm who is a member of this bar is M. C. Martin, Esq., and he was engaged full time in other matters which took him away from his office. He signed the petition for certiorari. Mr. Carlton, the remaining member of the firm, who had no knowledge of the case and no experience with procedure in this court, supervised the filing of the papers in this court. See affidavit of Mr. Carlton dated December 8, 1942, which was filed in this court in this cause.

The petition for certiorari was denied by this court on January 4, 1943, when the petitioners were seeking other counsel to represent them in this court.

The application for leave to file this petition for rehearing and its allowance followed.

The petitioners present herewith their revised petition for a writ of certiorari and their brief in support of it.

Wherefore they pray that their petition for rehearing be granted and that upon reconsideration their petition for certiorari may also be granted.

Lima, Ohio
February 6, 1943

J. S. Garlington and
Jennie L. Garlington, *Petitioners.*

Ross Carlton,
Dallas, Texas
Of Counsel.

By Elmer McClain, Lima, Ohio,
and William Lemke,
Fargo, North Dakota,
Their Counsel.

Verification.

United States of America
Northern District of Texas
County of Howard, ss:

J. S. Garlington and Jennie L. Garlington, being duly sworn, say they are the petitioners named in the foregoing petition for rehearing of their petition for certiorari, and that the statements made therein are true as they verily believe.

J. S. Garlington,

Jennie L. Garlington.

Sworn to before me and in my presence subscribed this ..... day of February 1943.

Notary
Seal

Notary Public.

Certificate of Counsel.

We certify that the foregoing petition for rehearing is filed in good faith and not for any purpose of delay.

ELMER MCCLAIN,
Counsel for the Petitioners.

Lima, Ohio
February 15, 1943

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 405

J. S. GARLINGTON, et ux.,
Petitioners,
vs.
A. L. WASSON

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

SUPPLEMENT

to

Petition for a Writ of Certiorari to the Supreme Court of the State of Texas.

(The brief in support of the petition for certiorari begins at page 15)

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

Summary Statement of the Matter Involved.

While the petitioners' farmer debtor proceeding was pending in the bankruptcy court the present respondent who was holder of a second mortgage, by deed of trust, on 2560 acres of the farmer debtors' land which had been scheduled in the farmer debtor proceeding proceeded to foreclose under a power of sale included in the mortgage. The trustee executed his deed to the mortgage holder. Farmer debtors' petition: R. 67 to 68. Schedules: R. 70, R. 74. Mortgage deed of trust: R. 48 to 53. Notice of trustee's sale: R. 57. Trustee's deed: R. 54 to 56.

The present respondent as mortgage holder then brought suit in the state District Court of Howard County, Texas, against the present petitioners for an order of possession, a writ of ejectment, an order validating the foreclosure procedure by power of sale, and an order clearing the title of the mortgagee as purchaser in foreclosure. R. 6 to 8.

The respondent in his petition in the state court alleged that his foreclosure by power of sale through his trustee was authorized by an order of the bankruptcy court in the farmer debtor proceeding. Petition in state court: R. 6 to 8. The order of the bankruptcy court relied upon was set forth as Exhibit A to said petition. R. 8 to 11.

The record shows that the foreclosure procedure under the power of sale was instituted in violation of Section 75 (n), (o), and (p) and also in violation of Rule 62 (a) of the Rules of Civil Procedure.

The state court gave judgment for the plaintiff. Judgment of state court: R. 22 to 24.

On appeal to the state Court of Civil Appeals of the State of Texas, the appeal was dismissed. R. 87. Motion for rehearing was overruled. R. 95. Application for writ of error was denied by the Supreme Court of Texas. R. 100. A motion for rehearing was overruled. R. 104. Time for filing petition for certiorari in this court was extended to September 19, 1942, and it was then filed. R. 104.

II.

The Basis of the Jurisdiction of This Court.

A federal question has been the sole issue in all the state courts.

The original suit brought by the respondent in the state District Court of Howard County, Texas, was grounded upon an alleged order of the bankruptcy court. R. 6. Exhibit A, at R. 8. The said alleged order of the bankruptcy court was based upon Section 75 of the Bankruptcy Act, U. S. C. Title 11, Section 203. The petitioners, as defendants in the state courts raised the federal question at their first appearance wherein they filed their Plea in Abatement and Motion to Quash. R. 2, especially paragraph 1 at R. 2. Also in their Answer, R. 17 to 21, especially paragraph 1 at R. 18, beginning at the top of the page. They put in evidence their farmer debtor petition and

schedules from the files of the bankruptcy court. Defendants' Exhibit D-1, R. 67 to 68. They showed that their farmer debtor proceeding was pending long after the alleged foreclosure by power of sale. (Date of foreclosure January 2, 1940, see Plaintiff's Exhibit 2, R. 54 to 56.) Testimony of Conciliation Commissioner Smith on May 17, 1941 (R. 24 fol. 44). R. 41 to 43. Defendants' Exhibit D-2 shows their farmer debtor proceeding in their case still pending on November 22, 1940. R. 79 to 80.

On appeal to the state Court of Civil Appeals the federal question is discussed at R. 92 to 94.

In the Supreme Court of Texas the federal question is discussed at R. 96 to 99. Also at R. 101 to 103.

The Supreme Court of the State of Texas is the court of last resort of that state and the said judgment is final judgment which presents a federal question.

The jurisdiction of this court is conferred by Section 237 of the Judicial Code; 28 U. S. C. 344.

The petitioners have complied with Section 8(a) of the Act of February 13, 1925; 28 U. S. C. 350. Time to file a petition for a writ of certiorari was extended to September 19, 1942, and the petition for certiorari was filed on that date. R. 104.

III.

The Questions Presented.

1.

Do the prohibitions in the farmer debtor provisions of Section 75 (n), (o), and (p), of the Bankruptcy Act, against mortgage foreclosures during the pendency of a

farmer debtor proceeding, apply to a foreclosure under a power of sale by trustee embodied in a mortgage deed of trust?

2.

May the foreclosure of a mortgage be instituted during the pendency of a farmer debtor proceeding under Section 75 of the Bankruptcy Act where the foreclosure is pursuant to a power of sale by trustee under the terms of a mortgage deed of trust?

3.

May the foreclosure of a mortgage be instituted during the pendency of a farmer debtor proceeding under Section 75 of the Bankruptcy Act where the prohibitions of Section 75 (n), (o), and (p), are disregarded?

4.

May the trustee, under a power of sale embodied in a mortgage deed of trust, proceed to foreclose the mortgage by authority of an unlawful order of the bankruptcy court in a farmer debtor proceeding which embraces the farmer debtor and the property involved in the foreclosure?

5.

When the mortgagor and the security named in a mortgage deed of trust have become subject to the exclusive jurisdiction of the bankruptcy court under the farmer debtor provisions of Section 75 of the Bankruptcy Act, may the trustee named in said mortgage deed of trust proceed under a power of sale therein to foreclose under said mortgage deed of trust when no effective authority to so proceed has been issued by the bankruptcy court?

6.

Assuming that a lawful order authorizing foreclosure of a mortgage has been entered by a bankruptcy court in a farmer debtor proceeding under Section 75 of the Bankruptcy Act, may the foreclosure so authorized be instituted before such order becomes effective?

7.

May an order of a bankruptcy court which is subject to appeal be put into execution before ten days from the entry thereof?

IV.

Reasons Relied Upon for Allowance of a Writ of Certiorari.

1.

The interpretation of a statute of the United States is involved, namely Section 75 (n), (o), and (p), of the Bankruptcy Act, 11 U. S. C. 203 (n), (o), and (p). That statute places the exclusive jurisdiction over the farmer debtor and his property in the bankruptcy court and provides that such exclusive jurisdiction may not be surrendered except by compliance with the terms prescribed therein.

2.

The interpretation of another statute of the United States is involved, namely 28 U. S. C. 874, and 880, and Rule 62 (a) of the Rules of Civil Procedure.

3.

There is involved an unlawful order of a United States District Court, as a court of bankruptcy, issued in violation of the mandate of the statute prescribed in Section 75 (o) and (p) of the Bankruptcy Act.

4.

There is involved an unlawful order of a United States District Court, as a court of bankruptcy, issued in violation of the mandate of the statute in Section 75 (n).

5.

The order of the state court attempted to validate an illegal title to real estate acquired under the guise of an unlawful order of a United States Court contrary to the Constitution of the United States, namely, Article VI thereof, and Amendment XIV thereto, and Article I, Section 8, clause 4 thereof.

6.

The order of the United States District Court as a court of bankruptcy, in purporting to authorize the foreclosure of property brought within its jurisdiction by the farmer debtors' petition and schedules in violation of Section 75 (n), (o), and (p), violated Amendment V to the Constiution.

7.

The order of the state court in presuming to validate a foreclosure proceeding instituted in violation of Section 75 (n), (o), and (p), of the Bankruptcy Act is in violation of Amendment XIV to the Constitution.

8.

The order of the United States District Court, upon which the respondent mortgage holder and purchaser in foreclosure relies, is in conflict with the decision of this court in *John Hancock* v. *Bartels*, 1939, 308 U. S. 180; *Gray* v. *Union*, 1939, 308 U. S. 523; *Morrison* v. *Federal*, 1939, 308 U. S. 524; *Kalb* v. *Feuerstein*, 1940, 308 U. S. 433; *Borchard* v. *California*, 1940, 310 U. S. 311; *Wright* v. *Union Central*, 311 U. S. 273; *Wright* v. *Logan*, 1942, 315 U. S.

139; *Mangus* v. *Miller*, 1942, ... U. S. ....; *Wragg* v. *Federal*, 1943, ... U. S. .....

Wherefore your petitioners pray, as heretofore, that a writ of certiorari duly issue to the Supreme Court of the State of Texas, to the end that the errors complained of may be corrected by this court.

Lima, Ohio
February 6, 1943.

ELMER MCCLAIN, Lima, Ohio,
WILLIAM LEMKE, Fargo, North Dakota,
Counsel for Petitioners.

ROSS CARLTON,
Dallas, Texas,
Of Counsel.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

I.

The Index precedes the petition for rehearing.

II.

No Report of an Opinion Below.

There is no reported opinion on the merits of either the Supreme Court of Texas, the Court of Civil Appeals of Texas, or the District Court of Texas.

The final order of the District Court of Texas appears at R. 22 and 23.

The Order of the United States District Court, as a court of bankruptcy, upon which the final order of the District Court of Texas is based is at R. 58 to 60.

III.

The Grounds Upon Which the Jurisdiction of This Court Is Invoked.

The grounds set forth to sustain the jurisdiction of this court are set forth in the preceding supplement to the petition for certiorari at pages 7 to 14 under headings "The Basis of the Jurisdiction of This Court," "The Questions Presented," and "Reasons Relied Upon for Allowance of a Writ of Certiorari."

IV.

Concise Statement of the Case.

On July 26, 1939, the petitioners filed their farmer debtor petition under Section 75 (a) to (r) in the District Court of the United States for the Northern District of Texas. Caption: R. 67. File Mark: R. 78.

On December 6, 1939, the District Court entered an unlawful order abandoning and disclaiming the 2560 acres involved here and authorizing the respondent to foreclose his mortgage deed of trust. R. 58. File mark: R. 61. This order was unlawful: *Union* v. *Byerly*, 1940, 310 U. S. 1; *Kalb* v. *Feuerstein*, 1939, 308 U. S. 433; *John Hancock* v. *Bartels*, 1939, 308 U. S. 180.

This order was by statute not effective until December 16, 1939, Rules of Civil Procedure, Rule 62 (a), 28 U. S. C. 874 and 880.

The respondent's mortgage deed of trust requires that before foreclosure the land be first advertised for sale for a period of **Twenty-one days** ("at least twenty days successively next before the day of sale, **exclusive of the day of posting and the day of sale**"). R. 51.

The advertisement was begun on the day the order was entered and ten days before the order was effective, that is on December 6, 1939. Date of the advertisement: R. 57 at bottom of page. The advertisement between December 6 to December 16, 1939, was thus unlawful.

The period of the required twenty-one days advertisement from the effective date of the order of December 16, 1939, expired on January 6, 1940. The foreclosure sale was completed and the deed was executed on January 2,

1940. R. 54 to 56. Date of deed: R. 56, top of page. This deed to the purchaser in foreclosure was made **four days** before a deed could lawfully be made. It is therefore a nullity.

The judgment of the state District Court obtained on May 24, 1941, by the respondent to validate his void deed in foreclosure which he presumed to take under the unlawful order of the United States District Court is therefore a nullity. R. 22 to 24.

This judgment of the state District Court did not become final until the litigation concerning it had passed into the final judgment of the Supreme Court of Texas when a motion for rehearing was overruled on May 20, 1942. R. 104.

The time for filing the petition for certiorari herein was extended to September 19, 1942 and it was filed on that date. R. 104.

V.

Specification of Errors.

1.

The state courts erred in recognizing as valid the order of the state District Court which purported to validate the foreclosure procedure followed by the respondent and to clear the title of the respondent under his mortgage deed of trust.

2.

The state courts erred in treating as valid the presumed authority in the respondent to institute and maintain foreclosure of his mortgage deed of trust.

3.

The purported authority obtained by the respondent under which he presumed to foreclose his mortgage deed of trust was void.

4.

The procedure employed by the respondent through his trustee to foreclosure his mortgage deed of trust was invalid and void.

VI.

Summary of the Argument.

The order of the United States District Court, dated December 4, 1939, and entered December 6, 1939, purporting to abandon and disclaim from the farmer debtor proceeding for composition or extension under Section 75 (a) to (r) 2560 acres of the property scheduled by the farmer debtors, was unlawful and void. The respondent has no right to rest upon such an unlawful order which he himself obtained in an unlawful manner.

Even if the order of December 6, 1939, from the United States District Court had been a valid order it could not become effective until ten days thereafter, that is on December 16, 1939. The mortgage deed of trust under which the respondent claims his title by foreclosure requires twenty-one full days of notice by advertisement before sale in foreclosure can be held. Unlawful advertisement can not support a foreclosure sale. The respondent took his present title by a void deed which was made and recorded before the time required to complete foreclosure had expired.

Such void deed could not convey any title to the respondent by any judgment of the District Court of Texas. Such judgment must be held to be void. That judgment did not become final for any purpose until the appeal from it was finally terminated by the Supreme Court of Texas. It is that judgment which is presented to this court for review by certiorari.

VII.

ARGUMENT.

That the order of the District Court of the United States of December 6, 1939, which presumed to abandon and disclaim the property of the farmer debtors and to authorize the mortgagee to foreclose, is unlawful has been indisputably determined by this court. *Union* v. *Byerly*, 1940, 310 U. S. 1. *Kalb* v. *Feuerstein*, 1939, 308 U. S. 433. *John Hancock* v. *Bartels*, 1938, 308 U. S. 180.

This order of the United States District Court was not only **unlawful**, it was also **void**. A reading of that order at R. 58 shows that the procedure prescribed in Section 75 (o) was ignored. That procedure requires:

1. A petition to the judge;
2. Reference of the petition to the conciliation commissioner;
3. Hearing by the conciliation commissioner;
4. Report by the conciliation commissioner;
5. An order by the judge.

The facts in this case are not those in the *Byerly* case where this court by a divided opinion held that, although a similar order was unlawful, yet it was not void because the **state court** in conducting foreclosure proceedings had a right to presume that the bankruptcy court knew how to conduct its procedure. In the *Byerly* case the state court finally acted by completing foreclosure when the farmer debtor case stood **dismissed**. Here the farmer

debtor case was at **all times pending.** Here it was **not the state court** which conducted the foreclosure, but **the mortgage holder himself** through his trustee under a power of sale without the intervention of any court proceeding. **He, the mortgage holder himself,** obtained the unlawful United States District Court order and then **he himself** proceeded under that unlawful order. **He himself** had no right to presume that **his own wrong** was right—that **his own** unlawful procedure was lawful.

Section 75 (n), (o), and (p), are very clear and peremptory:

> Section 75(n): "The filing of a petition . . . shall immediately subject the farmer and **all his property** wherever located, for all the purposes of this section, to the **exclusive jurisdiction of the court.**
>
> Section 75 (o): "Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings **shall not be instituted** . . . in any court **or otherwise** against the farmer or his property . . . Proceedings for foreclosure of a mortgage on land . . ."
>
> Section 75 (p): "The prohibitions of subsection (o) . . . **shall apply** to all creditors, public or private, and to all the debtors' property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors as provided for in Section 75 of this Act."

No words could be plainer or more peremptory.

The respondent can not build his title upon his own wrong and upon the unlawful act of the bankruptcy court which he importuned that court to commit.

At all times involved in this issue the farmer debtor proceeding in the bankruptcy court was under Section 75

(a) to (r) for composition or extension. It never progressed into Section 75 (s). There was no adjudication. Nearly a year thereafter, on November 11, 1940, it was still pending under Section 75 (a) to (r) for composition or extension. See R. 79 to 80.

Article VI of the Constitution makes the Section 75 which was passed in pursuance of the Constitution the Supreme Law of the Land and requires every judge of every state and federal court to observe it and to swear that he will observe it. The order of the United States District Court violates this provision of the Constitution. No judgment of a state court may validate the unlawful order of the United States District Court.

But even if the argument of the mortgage holder should prevail that (1) the order of the United States District Court was lawful, or (2) if unlawful it was no void, because he who sought that unlawful order could make it lawful by proceeding under it to sell to himself under the power of sale in the mortgage deed of trust to him, he (3) can not surmount the third hurdle, namely that he did not proceed according to the terms of the mortgage which he exacted from the mortgagors as found in his mortgage deed of trust.

The applicable part of the respondent's mortgage deed of trust from the petitioners reads as follows:

> ". . . But should the said J. S. Garlington and wife, Jennie L. Garlington, parties of the first part, make default in the punctual payment of said indebtedness, or any part thereof, principal or interest, as the same shall become due and payable, or should said parties of the first part in any respect fail to keep and perform any one or more of the conditions herein provided to be kept and performed by said parties of the first part, then, and in any such case, the whole amount of said indebtedness remaining unpaid shall,

at the option of the party of the third part, or other holder thereof, immediately mature and become payable, and it shall thereupon, or at any time thereafter, the same or any part thereof remaining unpaid, be the duty of the said party of the second part herein, and of his successor substitute, as hereinafter provided, on the request of the said party of the third part, or other holder thereof (which request is hereby presumed) to enforce this Trust; and **after advertising the time, place and terms of the sale of all the above conveyed and described property for at least twenty days successively next before the day of sale, exclusive of the day of posting and the day of sale, by posting up written or printed notices thereof . . .**" From the mortgage deed of trust, R. 50 to 51.

That is, the advertisement must be made continuously for twenty-one days immediately preceding the day of sale.

The day of sale was set for January 2, 1940:

"Notice is hereby Given That on Tuesday, the **2nd day of January, 1940**, between ten o'clock A. M. and four o'clock P. M., I will sell said real Estate . . ." From the notice of sale, R. 57.

This notice of sale was dated December 6, 1939, the very day the order of the bankruptcy court was entered:

"Witness My Hand this 6th day of December, 1939." From the notice of sale, R. 57.

The sale was held on January 2, 1940, as noticed. On that date too the deed was executed and recorded. R. 54 to 56. Date of deed: R. 56, top of page. Date of Record: R. 56, bottom of page.

Now the authority by which the respondent as mortgage holder under his mortgage deed of trust presumed to conduct this sale through his trustee was dated December 4, 1939, and filed December 6, 1939. R. 58 to 61. (The file

date of December 6, 1940, in the record at the top of R. 61 is obviously a misprint for 1939. If 1940 is the actual filing date, it is all the worse for the respondent. We take 1939 as the correct date.)

No order of a United States District Court is effective until after ten days have elapsed after its entry:

> "Except as stated herein, no execution shall issue upon a judgment **nor shall proceedings be taken for its enforcement** until the expiration of 10 days after its entry." Rules of Civil Procedure, Rule 62 (a).

There is no exception which is applicable to the order of December 6, 1939. The word "judgment" is defined in Rule 54 (a) as follows:

> " 'Judgment' as used in these rules includes a decree and any order from which an appeal lies." Rules of Civil Procedure, Rule 54 (a).

Therefore no lawful advertisement of sale could be made before December 16, 1939, as the twenty-one days required in the mortgage deed of trust for advertisement immediately preceding the sale expired on January 6, 1940, it is obvious that the trustee's deed in foreclosure which was executed and recorded on January 2, 1940, could not be valid. If a deed in foreclosure could be valid when the required preliminary advertisement was made while there was no power to make it, then a mortgage holder may advertise at any time and "can" his advertisement for future use when it suits his convenience!

Amendments V and XIV to the Constitution prohibit both the United States District Court and the state courts from taking from the petitioners their property without due process of law. Both the federal court and the state courts by their respective judgments would, if permitted

by this court, so deprive the petitioners of the 2560 acres contrary to due process of law.

So the respondent's title is void for want of foreclosure. He is still a mortgagee under the original mortgage deed of trust. Title is still in the farmer debtors, subject to the mortgage lien.

It is therefore an inescapable conclusion that the deed which the respondent obtained and recorded is void.

CONCLUSION.

The plain intent of Section 75 has been circumvented and a great injustice has been done to the petitioner. There is no intervening party and no right has vested. The respondent has deliberately thwarted the Federal statute. This he has confessed at page 8 of his motion to dismiss where he says, "respondent, A. L. Wasson, admits that there was an irregularity in the procedure of the Federal District Court."

As the judgment of the state court which is brought before the court can not possibly be a valid order, this court should review it so that the Constitution of the United States and the laws made in pursuance thereof may not be violated by the state courts.

Respectfully submitted,

Lima, Ohio
February 6, 1943.

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